ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION IV

CA 06-1152

MAY 30, 2007

ALL-TECH MACHINE & TOOL, INC. APPELLANT	APPEAL FROM THE CRAWFORD COUNTY CIRCUIT COURT [NO. CV-2003-309]
V.	HONORABLE GARY R. COTTRELL, JUDGE
SIMMONS FOODS, INC. and HANOVER INSURANCE APPELLEES	AFFIRMED ON DIRECT APPEAL; AFFIRMED ON CROSS APPEAL

Appellant All-Tech Machine & Tool, Inc., brings this appeal challenging the circuit court's directed verdict on its breach-of-contract and negligence claims against appellee Hanover Insurance. All-Tech also appeals the trial court's decision regarding the amount of attorney's fees that cross-appellant Simmons Foods, Inc., was ordered to pay All-Tech. On cross-appeal, Simmons raises issues regarding the timeliness of All-Tech's request for attorney's fees, as well as the trial court's grant of prejudgment interest to All-Tech. We affirm on both direct appeal and on cross-appeal.

Background

This appeal has its genesis in a fire that occurred at a Simmons plant in October 2002. The fire is believed to have started when one of All-Tech's welders ignited cork insulation inside one of the walls. Simmons asserted that the fire caused $2.6 million in damages and made a claim for that amount on All-Tech's liability policy with Hanover. Hanover investigated the claim and eventually settled the claim for the policy limits, $1 million, in August 2003. In connection with the settlement of the claim, Simmons executed a "Settlement Release and Indemnity Agreement." The agreement contained the following language:

> 1. All-Tech, upon receipt of [$1 million by Simmons], immediately shall be released, acquitted, and discharged by [Simmons], together with All-Tech's . . . insurers, including, but not limited to, [Hanover] from all claims, demands, charges, costs and causes of action of whatever nature, and from all liability and damages of any kind, known or unknown, of [Simmons] arising out of the [fire]. . . .
>
> 2. By executing this release Simmons does not waive, and hereby expressly reserves, any defenses that it may have to the claims asserted by All-Tech in [the present litigation].
>
> 3. [Simmons] understand[s] that this settlement is in full accord and satisfaction of all damages or claims owed to [it] or that may be owed to [it] by All-Tech arising out of the [fire], ...

While the claim was being investigated, All-Tech continued its work at Simmons's plant in late December 2002. Simmons refused to pay, and on June 20, 2003, All-Tech filed suit, alleging that Simmons owed $70,231.72 for work All-Tech had performed. Simmons answered, denying the material allegations and asserting the defense of set-off.

On June 25, 2004, All-Tech amended its complaint to add Hanover as a defendant. The complaint alleged bad-faith and civil-conspiracy claims against Hanover, asserting that Hanover never consulted with All-Tech during the settlement negotiations between Hanover and Simmons and that Hanover was negligent in allowing Simmons to retain the right to assert a set-off defense to All-Tech's claim. Hanover denied the material allegations of the amended complaint.

In January 2005, All-Tech amended its complaint again, to assert additional breach-of-contract and negligence claims against Hanover. The amendments alleged that Hanover breached its contract with All-Tech by failing to inquire of All-Tech whether it had other claims pending against Simmons when Hanover allowed Simmons to retain its defenses to All-Tech's action. The amendment also asserted that this conduct constituted negligence on Hanover's part. Hanover again denied the material allegations of the amended complaint.

Trial Proceedings

At trial, All-Tech presented evidence to establish the amount of its claim, $63,831.72, and that the bill was not paid. Much of the rest of the evidence focused on liability for the October 2002 fire at Simmons's plant. Regarding Hanover's alleged negligence, Michael Wagner, Hanover's lead person on Simmons's claim, testified that he and Hanover's other investigators were not aware of Simmons's hot-work policy when he settled the claim.[1] He

[1]The policy relates to areas of the plant where Simmons determines that it is safe to weld and the procedures to be followed when welding.

said that Hanover did not interview All-Tech's welder or its owner. He added that Hanover would owe money to All-Tech if Simmons's set-off was allowed because Hanover's insurance policy requires that, when Hanover settles a claim, its insured is not going to suffer any other loss. Wagner stated that Simmons insisted that the set-off language be included in the settlement agreement but that Hanover did not know what Simmons was intending with the set-off.

After All-Tech rested, Hanover made a motion for a directed verdict on the bad-faith and civil conspiracy claims.[2] The trial court granted the motion. Hanover also argued that the construction of the settlement agreement was a matter of law for the court and that it fully released All-Tech so that there is nothing for Simmons to set off against All-Tech's debt claim. After Simmons put on its case and rested, Hanover again made a motion for a directed verdict as to the remaining negligence and breach-of-contract claims. The trial court granted the motion, ruling that the negligence claim applies only if the set-off is allowed. The court noted that the settlement agreement has nothing to do with the claim for the December 2002 work for which All-Tech was not paid.

The case was submitted to the jury on All-Tech's claim against Simmons for the unpaid work. The jury returned a verdict for All-Tech in the amount of $150,000. Judgment was entered on the jury's verdict on May 10, 2006. In the judgment, the trial court noted that

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[2]Hanover also made a motion for a directed verdict on the breach-of-contract and negligence claims. That motion was denied.

Simmons had made oral motions for remittitur and for a new trial. The court also noted that All-Tech's complaint contained a request for attorney's fees. The court set a schedule for Simmons's written motions and briefs. On May 23, 2006, Simmons filed a motion for judgment notwithstanding the verdict or, in the alternative, a motion for new trial or remittitur. All-Tech filed a motion for attorney's fees on June 29, 2006.

On June 21, 2006, the trial court granted Simmons's motion for remittitur and reduced the judgment to $64,401.90. The court also awarded All-Tech attorney's fees of $8,694.26 and prejudgment interest of 6%, running from January 30, 2002. An amended order was entered on June 30, 2006, to provide that the prejudgment interest shall run from January 30, 2003. The amended order did not specifically rule on the motion but awarded All-Tech attorney's fees as in the earlier order. Simmons and All-Tech timely appealed and cross-appealed.

Arguments on Appeal

Directed Verdict of All-Tech's Claims

All-Tech first argues that the trial court erred in directing a verdict on its negligence and breach-of-contract claims against Hanover.

The supreme court recently discussed the standard to be applied when reviewing a trial court's grant of a motion for directed verdict and stated:

> In deciding whether the grant of a motion for directed verdict was appropriate, appellate courts review whether there was substantial evidence to support the circuit court's decision. *See, e.g., Ward v. Williams*, 354 Ark. 168, 118 S.W.3d 513 (2003); *Woodall v. Chuck Dory Auto Sales, Inc.*, 347 Ark. 260, 61 S.W.3d 835 (2001). A motion for directed verdict should be granted only if there is no substantial evidence to

> support a jury verdict. *Mangrum v. Pigue*, 359 Ark. 373, 198 S.W.3d 496 (2004); *Curry v. Thornsberry*, 354 Ark. 631, 128 S.W.3d 438 (2003); *Mankey v. Wal-Mart Stores, Inc.*, 314 Ark. 14, 858 S.W.2d 85 (1993). Stated another way, a motion for a directed verdict should be granted only when the evidence viewed is so insubstantial as to require the jury's verdict for the party to be set aside. *Curry*, 354 Ark. 631, 128 S.W.3d 438; *Congra, Inc. v. Strother*, 340 Ark. 672, 13 S.W.3d 150 (2000). Where the evidence is such that fair-minded persons might reach different conclusions, then a jury question is presented, and the directed verdict should be reversed. *Howard v. Hicks*, 304 Ark. 112, 800 S.W.2d 706 (1990).

Crawford County v. Jones, 365 Ark. 585, 594-95, ___ S.W.3d ___, ___ (2006).

All-Tech argues that Hanover was negligent in allowing the set-off to be included in the settlement agreement and by failing to properly investigate Simmons's claim and discover the hot-work policy. At the time Simmons filed its answer, the claim from the fire had not been resolved. Therefore, Simmons properly asserted a set-off for this loss in its answer. Thereafter, Simmons and Hanover settled the fire claim and the settlement agreement was executed, releasing All-Tech from all claims relating to the fire. The trial court ruled that, because it had excluded Simmons's set-off defense, All-Tech had not incurred any damages. Neither Simmons or All-Tech challenge the trial court's decision denying Simmons's set-off defense.

Negligence without damage is not actionable. *Palmer v. Intermed, Inc.*, 270 Ark. 538, 606 S.W.2d 87 (Ark. App. 1980). All-Tech asserts that it was damaged in the form of higher insurance premiums based on the Simmons claim. Mike McAlister, the owner of All-Tech, testified that All-Tech's insurance premiums increased from $2,300 per year before the fire to approximately $25,000 annually after the fire and that Hanover dropped All-Tech. However,

this does not establish a causal connection between Hanover's *negligence in handling the claim*, if any, and the increase in the premiums. The decision to drop All-Tech and the resulting rate increase due from changing insurance carriers could be related solely to the fact that a large claim was made against All-Tech, regardless of how that claim may have been handled. All-Tech's argument focuses more on Hanover's alleged acts of negligence and devotes only two sentences to the damages All-Tech is alleged to have suffered. However, as pointed out above, there was no testimony linking Hanover's negligence in handling the claim to the increase in premiums.

All-Tech relies on the supreme court's decision in *Farm Bureau Mutual Insurance Co. v. Running M Farms, Inc.*, 366 Ark. 480, __ S.W.3d __ (2006), for the proposition that Arkansas recognizes a cause of action for negligent performance of an insurance contract. However, the issue in this case is not whether Arkansas recognizes such a cause of action. Rather, the issue is whether All-Tech presented sufficient evidence to show that Hanover breached its contract and was negligent to survive a motion for a directed verdict. We cannot say that the trial court erred in directing a verdict on these claims.

Prejudgment Interest

On cross-appeal, Simmons argues that All-Tech is not entitled to an award of prejudgment interest. All-Tech did not respond to this argument in its response brief.

Prejudgment interest is compensation for recoverable damages wrongfully withheld from the time of the loss until judgment. *Perkins v. Cedar Mountain Sewer Improvement*

Dist., 360 Ark. 50, 199 S.W.3d 667 (2004); *Ozark Unlimited Resources Co-op., Inc. v. Daniels*, 333 Ark. 214, 969 S.W.2d 169 (1998). Prejudgment interest is allowable where the amount of damages is definitely ascertainable by mathematical computation or if the evidence furnishes data that makes it possible to compute the amount without reliance on opinion or discretion. *Ray & Sons Masonry v. United States Fid.& Guar. Co.*, 353 Ark. 201, 114 S.W.3d 189 (2003); *Woodline Motor Freight, Inc. v. Troutman Oil Co.*, 327 Ark. 448, 938 S.W.2d 565 (1997). This standard is met if a method exists for fixing the exact value of a cause of action at the time of the occurrence of the event that gives rise to the cause of action. *Dugal Logging, Inc. v. Arkansas Pulpwood Co.*, 66 Ark. App. 22, 988 S.W.2d 25 (1999). Where prejudgment interest may be collected at all, the injured party is always entitled to it as a matter of law. *TB of Blytheville v. Little Rock Sign & Emblem*, 328 Ark. 688, 946 S.W.2d 930 (1997).

Simmons first argues that the award of prejudgment interest was improper because there was no method of ascertaining the amount of All-Tech's damages at the time All-Tech's cause of action accrued. Simmons also contends that the award was improper because litigation was necessary to determine the precise amount it owed All-Tech. However, Simmons is mistaken on both points.

In the present case there was a method to determine the amount owed at the time the dispute arose — the value of the labor and materials used in the job determines the amount owed. Patti Lynch, a secretary at All-Tech, testified that All-Tech's workers logged 568 hours

at Simmons's plant and that Simmons was billed $42,410 for the labor and $21,421.72 for materials for which All-Tech was not paid. This included work performed by a subcontractor All-Tech hired and paid. Even though litigation was required and All-Tech recovered less than it sought in its complaint, the test for prejudgment interest has been met. See *Wilson v. Lester Hurst Nursery*, 269 Ark. 19, 598 S.W.2d 407 (1980).

Simmons also argues that an award of prejudgment interest is improper because All-Tech never filed a motion seeking such interest. A complaint's prayer for general relief is a sufficient basis for an award of 6% prejudgment interest, *Eckles v. Perry-Austen Bowling Products, Inc.*, 275 Ark. 235, 238, 628 S.W.2d 869, 870 (1982), and All-Tech's complaint specifically sought "interest at the maximum legal rate allowed by law," as well as a prayer for general relief. The trial court did not err in awarding prejudgment interest.

Attorney's Fees

In this section, we discuss both All-Tech's contention that the trial court did not properly consider all of the factors bearing on an award of attorney's fee and, therefore, the fee award was too low, as well as Simmons's claim that All-Tech's motion for fees was untimely in that it was filed more than fourteen days after the entry of judgment.

Our supreme court has said that attorneys' fees are not allowed except where expressly provided for by statute. *Chrisco v. Sun Indus.*, 304 Ark. 227, 800 S.W.2d 717 (1990). An award of attorneys' fees will not be set aside absent an abuse of discretion by the trial court. *Id*. While the decision to award attorneys' fees and the amount awarded are reviewed under

an abuse of discretion standard, we review factual findings by a circuit court on the existence of the *Chrisco* factors under a clearly erroneous standard of review. *Davis v. Williamson*, 359 Ark. 33, 194 S.W.3d 197 (2004).

A. Timeliness of Request

Arkansas Rule of Civil Procedure 54(e) provides, in pertinent part, as follows:

> (1) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.
>
> (2) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute or rule entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which the claim is made.

Simmons argues that All-Tech did not timely file its fee motion because judgment was entered on May 10, 2006, and the motion was not filed until June 29, 2006, which was after the trial court awarded fees on June 21. All-Tech argues that it was not required to file its motion within fourteen days because the judgment entered on May 10, 2006, was not "final" and that Simmons's motion for new trial served to give All-Tech an additional fourteen days in which to file its motion.

In *State Auto Property & Casualty Insurance Co. v. Swaim*, 338 Ark. 49, 991 S.W.2d 555 (1999), our supreme court held that Rule 54(e)(1) does not require a written motion for attorney's fees. The *Swaim* court affirmed the trial court's award of fees based on an oral

motion and relied on Rule 54(e)(2), which states that a motion must be filed "unless otherwise provided . . . by order of the court." Here, such an order appears within the section of the trial court's written judgment, which set forth a schedule for post-trial motions and briefs to be filed and acknowledged that All-Tech had requested fees in its complaint. Consequently, the request would fall within the ambit of Rule 54(e)(2) that excuses the filing of a written motion when the trial court provides otherwise. The *Swaim* court also noted that an award of attorney's fees pursuant to Ark. Code Ann. § 16-22-308, the statute authorizing an award of fees in breach-of-contract actions, further obviates the need for a motion to be filed requesting the fees. Furthermore, whether out of concern about compliance with Rule 54(e)(2) or disappointment over the amount of fees the trial court had awarded, All-Tech filed a written motion for attorney's fees on June 29. Although this was several weeks after the jury verdict was rendered, it was within fourteen days following entry of the remittitur judgment filed June 21. Consequently, we hold that All-Tech complied with the formalities of Rule 54(e)(2) and we cannot say that the trial court erred in awarding attorney's fees to All-Tech.

B. Amount of Fees Awarded

All-Tech's argument on this point is that the trial court did not properly evaluate all of the factors bearing on an award of attorney's fees. In its written motion, filed after the trial

court had already awarded attorney's fees of $8,694.26, All-Tech asserted that it was entitled to fees of one-third of the amount recovered, based on the contract with its attorneys.[3]

This court has recently observed that there is no fixed formula in determining reasonable attorney's fees. *Millwood-RAB Mktg., Inc. v. Blackburn*, 95 Ark. App. 253, ___ S.W.3d ___ (2006) (citing *Phi Kappa Tau Housing Corp. v. Wengert*, 350 Ark. 335, 86 S.W.3d 856 (2002)). However, a court should be guided in that determination by the following long-recognized factors: (1) the experience and ability of the attorney; (2) the time and labor required to perform the service properly; (3) the amount in controversy and the result obtained in the case; (4) the novelty and difficulty of the issues involved; (5) the fee customarily charged for similar services in the local area; (6) whether the fee is fixed or contingent; (7) the time limitations imposed upon the client in the circumstances; (8) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney. *Id*. Due to the trial judge's intimate acquaintance with the record and the quality of service rendered, we recognize the superior perspective of the trial judge in assessing the applicable factors. *Id*.

All-Tech argues that the factors support a higher fee than that awarded and asserts that its attorneys spent 280 hours on the case. Nothing in section 16-22-308 provides that a party is entitled to an award of all fees in cases where multiple claims have been pursued. *FMC*

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[3]We note that the contract is signed by Mike McAlister as the client, and there is no indication in the document that he is acting in a representative capacity for All-Tech. We further note that the contract is for a personal-injury claim.

Corp., Inc. v. Helton, 360 Ark. 465, 202 S.W.3d 490 (2005). Some of the hours claimed by All-Tech's attorneys were undoubtedly spent on its claims against Hanover, for which Simmons would not be liable. Further, All-Tech also included a civil conspiracy claim against Simmons and Hanover, a tort claim for which fees are not recoverable. Moreover, All-Tech did not provide time records or other means to determine the amount of time spent for which it could recover a fee. The fact that the agreed-upon fee was a contingency fee does not automatically entitle the attorney to that amount. The statute limits the attorney to a *reasonable* fee. We cannot say that the trial court abused its discretion in the amount of attorney's fees awarded.

Affirmed on direct appeal; affirmed on cross-appeal.

HART and GLADWIN, JJ., agree.